

BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

\* \* \* \* \*

TRUSTEES OF THE FRAZER PUBLIC	)	
SCHOOL DISTRICT NO. 2-2B,	)	
	)	
Appellant/Respondent,	)	OSPI 220-93
	)	
vs .	)	
	)	<b><u>DECISION AND ORDER</u></b>
PATRICIA C. BIRD,	)	
	)	
Respondent/Cross-Appellant.	)	

\* \* \* \* \*

**PROCEDURAL HISTORY AND FACTS OF THE APPEAL**

Frazer School District No. 2-2B [hereinafter "the District"] is appealing the January 8, 1993, decision of Valley County Superintendent of Schools, Janet Allie, ordering the District to reinstate Patricia Bird as a teacher's aide. Teacher's aide is a noncertified position that the District refers to as a classified staff position. Superintendent Allie found that the District's Superintendent, Dennis Maasjo, did not follow the District's written policy governing the termination of classified staff when he fired Ms. Bird. Ms. Bird filed a cross-appeal because the County Superintendent did not award punitive damages.

Patricia Bird was employed by the District as a teacher's aide during the 1990-1991 and 1991-92 school years. Superintendent Maasjo suspended her on October 29, 1991. On November 21, 1991, the District Trustees reinstated her. On December 10, 1991, Superintendent Maasjo gave Ms. Bird written notice of the termination of her employment with the District. On December 17,

1991, the District Trustees notified her that an employment hearing would be held on January 13, 1992.

On January 13, 1992, she was suspended with pay because the Trustees concluded Superintendent Maasjo did not have the authority to terminate her. Several Trustee meetings were scheduled on this matter. On March 23, 1992, the Trustees decided to adopt Superintendent Maasjo's recommendation to terminate Ms. Bird.

She appealed to the County Superintendent who held a hearing on October 21, 1992. At the hearing Superintendent Maasjo offered testimony and exhibits to establish factual reasons to justify termination. Those included a grievance the Frazer Education Association filed concerning Ms. Bird's practice of carrying a tape recorder with her and writing notes in a personal log, several written statements from various employees, and Superintendent Maasjo's notes. (Respondent's Exhibits 1-20.)

Superintendent Maasjo testified that these were not part of Ms. Bird's personnel file stating "I don't put anything in that file." (Transcript, p. 90.) There were no District job description forms, performance evaluation forms, etc. in the record.

At the hearing the County Superintendent excluded witnesses when they were not testifying, including Superintendent Maasjo. The District objected that while Superintendent Maasjo was a witness, he was also the District's representative and should not be sequestered. The Superintendent also admitted into evidence a Department of Labor decision.

The Superintendent found in favor of Ms. Bird that the District did not follow its own written procedures for termination. It reinstated her but did not award attorney's fees or punitive damages.

#### STANDARD OF REVIEW

This Superintendent's review of a county superintendent's decision is based on the standard of review of administrative decisions established by the Montana Legislature in § 2-4-704, MCA, and adopted by this Superintendent in § 10.6.125, ARM. Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed under an abuse of discretion standard. Harris v. Trustees, Cascade County and Nancy Keenan, 731 P.2d 1318, 241 Mont. 272 (1990). The petitioner bears the burden of showing that he has been prejudiced by a clearly erroneous ruling. Terry v. Board of Regents, 714 P.2d 151, at 153, 220 Mont. 214, at 217 (1986).

The State Superintendent may not substitute her judgment for that of a county superintendent as to the weight of the evidence on questions of fact. Findings are upheld if supported by substantial, credible evidence in the record. A finding is clearly erroneous only if a "review of the record leaves the Court with the definite and firm conviction that a mistake has been committed." Wage Awweal v. Board of Personnel Appeals, 676 P.2d 194, at 198, 208 Mont. 33, at 40 (1984). Conclusions of law are reviewed to determine if the agency's interpretation of the law is correct.

Steer, Inc. v. Dept. of Revenue, 803 P.2d 601, at 603, 245 Mont. 470, at 474 (1990).

#### DECISION AND ORDER

Substantial, credible evidence supports the County Superintendent's findings that the District did not follow its written policy for evaluating classified staff, attempting to improve unsatisfactory job performance, and terminating classified staff. The County Superintendent's conclusion that the District had to follow its written procedure is correct as a matter of law. The decision of the County Superintendent is AFFIRMED.

#### OPINION

A. Prior to the years at issue the District adopted a written board policy. It was an agreed fact (Stipulation and Statement of Agreed Facts, dated June 18, 1992) that the policy was in effect during the 1991-92 school year and that Paragraphs 5.0 through 9.4.4 governed classified staff. A copy of these paragraphs was attached to the stipulation and made part of the record.

Paragraph 7.0 is a "Statement of Philosophy" and states:

It is the intent of the State law and various court rulings that all employees have protection under Montana employment laws. While classified staff members do not have the same degree of protection as certificated permanent school district employees, good practice and consideration for the rights of individuals prescribed a reasonable degree of fairness in all personnel actions.

Therefore, every effort will be made to keep all employees informed of their uerformance status at all times. It is important that superior performance be recognized. It is also important that they be notified as soon as possible when their service to the district is not satisfactory. Employees facing dismissal or nonrenewal of employment should be informed of the conditions for continued employment. (Emphasis added.)

The District's policy required position descriptions for employees. (District Policy, Paragraph 9.) There is no position description for Ms. Bird in the record and Superintendent Maasjo testified that he did not approve her job description. Respondent's Exhibit 2 is a library aide job description but the Superintendent could not identify it and testified he had never seen it before. (Transcript, p. 68.)

The District's policy required periodic evaluations on progress evaluation forms labeled Forms A, B, or E - Classified Evaluation Report. These reports were to be signed by the employee and the supervisor and become a permanent record in the employee's personnel file. No completed Forms A, B, or E are in the record. There are no evaluation reports of any kind for Ms. Bird in the record and Superintendent Maasjo testified that he never put anything into Ms. Bird's personnel records.

Paragraph 9.2.2 of the District's policy specifically requires evaluations for employees who are not performing satisfactorily. The District policy also states that employees would have the opportunity to respond in writing to comments on the evaluation. (District Policy, Paragraph 9.2.5.) The District offered extensive post-termination testimony and exhibits to show that Ms. Bird did not perform satisfactorily, but it did not evaluate her during her employment. She did not have the opportunity to respond, which the District had established as a pre-termination procedure, because the District did not follow its own personnel policy.

The District's policy established a plan of assistance for employees with unsatisfactory performance evaluations. (District Policy, Paragraph 9.3.) There is no plan of assistance for Ms. Bird in the record. District Policy, Paragraph 9.4, established the procedure to follow if an employee's work remained unsatisfactory, including the procedure to follow to terminate the employee. The District did not follow the process it adopted.

At the hearing before the County Superintendent, the District's own evidence established it did not follow its written procedures governing classified personnel. Superintendent Maasjo testified that he had received many complaints about Ms. Bird's conduct and formed the opinion that the complaints were well founded. (Transcript, p. 75.) When asked "did you take some corrective action?" he answered, "I terminated Patty Bird." (Transcript, p. 75.)

The District presented evidence to support its position that Ms. Bird was an employee at-will, not an employee under contract, and that her job performance was unsatisfactory. None of this evidence refutes the County Superintendent's finding that the District did not follow its own policy. Whether as a matter of law Ms. Bird was an employee under contract at-will, she was an employee of a District with written procedures for dealing with the unsatisfactory job performance of classified employees. The District did not follow its own procedures and policies.

The County Superintendent's conclusion that the District's failure to follow its own policies prevented it from terminating

Ms. Bird on March 23, 1992, is supported by Scott T. Medicine Horse v. Trustees, Big Horn County School District No. 27, 823 P.2d 230, 251 Mont. 65 (1991). The District argues that Medicine Horse supports its position because the Supreme Court upheld the termination of a nonclassified employee but the reasoning of that opinion actually supports Ms. Bird.

In Medicine Horse the Court looked to the District's written policy to determine the extent of a noncertified school district employee's pre and post-termination procedural rights because Medicine Horse established that an at-will employee of a school district does not have a property interest in his employment. Absent a property interest, the employee does not have a guarantee of due process (procedural safeguards) deriving from the 14th Amendment of the U.S. Constitution. A noncertified school district employee's procedural rights derive from statute and policy guidelines, not from the 14th Amendment.

Medicine Horse does not hold, however, that because an employee cannot rely on the 14th Amendment for procedural protection, that employee cannot rely on her employer's own written procedural safeguards. The Court's reasoning was the opposite. The Court was guided by the Big Horn County District 27's written policy, going so far as to quote it verbatim. Medicine Horse, 823 P.2d 230, at 232, 251 Mont. 65, at 69, 70.

Big Horn County School District No. 27's written policy allowed the Superintendent to terminate noncertified employees at any time. The elected Trustees had chosen not to provide a pre-

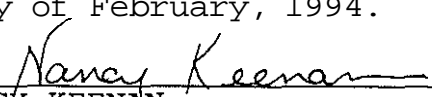
termination procedure for dealing with noncertified staff performance issues. Noncertified employees had two days to request a Board hearing but whether the Board granted the request was discretionary.

Unlike Mr. Medicine Horse, Ms. Bird did not need the protection of the 14th Amendment to have procedural rights. Her procedural rights were stated in the District's written policy about classified staff. Frazer School District's written policy, adopted by its elected Trustees, required the Superintendent to evaluate her performance, suggest improvement, and give her an opportunity to improve before she could be terminated.

B. On appeal, both parties also raise issues that have no effect on the outcome of this case. The County Superintendent excluded Superintendent Maasjo as a witness and admitted a Department of Labor report. Whether these rulings were right or wrong makes no difference to the outcome of this appeal. The ruling did not affect a substantial right of the District. If wrong, the evidentiary rulings were harmless error because they have no effect on the ultimate decision. Rule 103, M.R.Ev., Rule 61, M.R.Civ.P., Holm v. Parsons, 588 P.2d 531, 179 Mont. 375 (1979).

Ms. Bird's cross-appeal for punitive damages is also irrelevant to the outcome of this case. A county superintendent does not have jurisdiction to award punitive damages.

DATED this 16 day of February, 1994.

  
\_\_\_\_\_  
NANCY KEENAN




**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on this 17<sup>th</sup> day of February, 1994. a true and exact copy of the foregoing Decision and Order was mailed, postage pre-paid, to the following:

Patricia C. Bird  
Box 904  
Wolf Point, MT 59201

James D. Rector  
RECTOR **LAW** OFFICE  
635 First Avenue N.  
Wolf Point, MT 59201-1360

Janet B. Allie  
Valley County Supt.  
501 Court Square, Suite 114  
Glasgow, MT 59230

  
\_\_\_\_\_  
Scott Campbell  
Paralegal Assistant  
Office of Public Instruction